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No. _____

IN THE

Supreme Court of the United States

STATE OF MISSOURI,
Petitioner,

v.

DAVID T. GARCIA,
Respondent.

On Petition for a Writ of Certiorari
To the Supreme Court of Missouri

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a defendant who flees from the scene of a crime, and remains at large for a period of years as a result of that flight, nevertheless claim that his right to a speedy trial under the Sixth Amendment has been violated, without proving that he was prejudiced as a result of the delay in his apprehension?

PARTIES TO THE PROCEEDING

Petitioner, State of Missouri, represented by the office of the St. Louis County Prosecuting Attorney, is the plaintiff in the underlying criminal proceeding; the respondent, David T. Garcia, is the defendant. Respondent was the relator below in an action in mandamus brought before the Supreme Court of Missouri against the Honorable Steven H. Goldman, Judge of the Circuit Court of St. Louis County. Petitioner, State of Missouri, represented Judge Goldman (respondent) below and seeks relief before this Court from the judgment of the Supreme Court of Missouri.

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OPINIONS BELOW

The Missouri Supreme Court's August 31, 2010, Order denying petitioner's motion for rehearing is included in the Appendix ("App.") at A20.

The Missouri Supreme Court's opinion, entered on July 16, 2010, is reported at *State ex rel. Garcia v. Goldman*, 316 S.W.3d 907 (Mo. 2010), and is reprinted in the Appendix at A1.

The order of the Missouri Court of Appeals, Eastern District, denying respondent's petition for a writ of mandamus, was entered on April 14, 2010, and is included in the Appendix at A16.

JURISDICTION

The Supreme Court of Missouri denied petitioner's motion for rehearing on August 31, 2010. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ....

Constitution of the United States, Amendment XIV:

> ... No State shall ... deprive any person of life, liberty or property without due process of law ....

STATEMENT OF THE CASE

This petition seeks to clarify whether a defendant who flees from the scene of a crime and remains at large for a period of years may claim that his right to a speedy trial under the Sixth Amendment has been violated without proving that he was prejudiced as a result of the delay.

On April 9, 1998, Rigoberto Dominguez was working in the kitchen of the Sunny China International Buffet restaurant in Kirkwood, St. Louis County, Missouri. App. A2. Kwan Tung Tse, the owner of the restaurant, opened the kitchen door in response to a knock and let in a man who entered, talked to an employee and then left. App. A2. About a minute later, the man returned carrying a shotgun; he approached Dominguez and shot him in the abdomen at close range. App. A2. Dominguez was hospitalized but survived the assault. App. A2.

Meliton Gonzalez, another employee at Sunny China, followed the shooter outside and saw him get into a brown car. App. A2. Police responded immediately to the scene and interviewed the witnesses. App. A2. Gonzalez and two other witnesses, including the victim, identified the assailant as David T. Garcia, respondent herein. App. A2. Nabor Garcia, who is David Garcia's cousin and who shared a residence with him at the time of the shooting, said he saw his cousin come into the kitchen with the gun but did not witness the actual shooting. App. A2.

Police found a Mossburg pump-action 12-gauge shotgun discarded just north of the doorway exiting

from the kitchen. App. A2. They photographed the scene and created a diagram of the restaurant's kitchen area. App. A2.

Through their interviews of the witnesses, police obtained not only Mr. Garcia's name, but his address, birthdate and Social Security number. App. A2. Through that evening and into the early morning, they searched Mr. Garcia's residence and canvassed his apartment complex but were unable to locate him. App. A2-A3. In the weeks and months that followed, numerous members of the Kirkwood Police Department spoke to several people, all of whom were acquainted with Mr. Garcia and with each other, in an unsuccessful attempt to find Mr. Garcia's whereabouts. App. A18.

In January 2001, Kirkwood police were contacted by representatives of the St. Louis County Prosecuting Attorney's office and asked to make further attempts to locate Mr. Garcia, due to concerns that the statute of limitations might soon expire. App. A3. Police had received information that Mr. Garcia might be in any of a number of communities in north and central St. Louis County, and followed up on that information in early 2001. App. A3. On at least three occasions, they were admitted to certain residences and searched them, but did not locate Mr. Garcia, nor did they receive any leads or other information as to his whereabouts. App. A3.

On February 21, 2002, the St. Louis County Grand Jury handed up an indictment charging Mr. Garcia with assault in the first degree, alleging that on April 9, 1998, he knowingly caused serious

physical injury to Rigoberto Dominguez by shooting him, and armed criminal action, alleging that he committed that assault in the first degree by, with and through the use of a deadly weapon, to-wit, a shotgun. App. A3.

Mr. Garcia's whereabouts between the night of the shooting in April 1998 and September 2000, when he applied for a job in Chicago, remain unknown. App. A4, A7. He filed income tax returns, using his own name and a Chicago address, for tax years 2000 through 2008, and generally lived openly under his own name, date of birth and Social Security number from late 2000 onward. App. A3-A4, A7, A18..

In early 2009, Detective Steve Urbeck of the Kirkwood Police Department learned that the case against Mr. Garcia was still active and that Mr. Garcia had yet to be located or arrested. App. A3. He entered Mr. Garcia's Social Security number into a computer system called Accurint, and received a listing indicating an address of 3520 West 59th Street in Chicago. App. A3. Although this address turned out to be several months out of date, through the assistance of the Chicago Police Department's Fugitive Apprehension Section, police discovered that Mr. Garcia was working at the Renaissance Hotel in Chicago. App. A3. On February 11, 2009, Chicago police arrested Mr. Garcia on the St. Louis County indictment when he arrived for work. App. A3.

On or about December 7, 2009, Mr. Garcia filed a motion to dismiss the indictment against him, alleging violation of his right to a speedy trial under

the Sixth Amendment. App. A4. The trial court heard evidence on the motion in February and March, 2010, and considered a voluminous record of documents entered by stipulation. App. A17. The parties also stipulated that four witnesses endorsed by the state could not be located and are unavailable to testify; that videotaped statements of two witnesses (one of whom is still available, one of whom is not) have been lost; and that the Sunny China restaurant was demolished two years before Mr. Garcia was arrested. App. A4.

On March 26, 2010, the trial court entered an Order denying Mr. Garcia's Motion to Dismiss. App. A17-A19. The trial court applied the four-factor balancing test set forth by the Court in *Barker v. Wingo*, 407 U.S. 514 (1972). App. A17-A19. This test directs courts addressing a claim of a speedy-trial violation to consider the length of the delay; the reasons for the delay; the defendant's assertion of his right; and prejudice to the defendant. *Id.* at 533. In this case, the trial court found the length of the delay to be presumptively prejudicial, and also found that Mr. Garcia had asserted his speedy-trial rights in a reasonably timely manner; thus, the trial court weighed the first and third *Barker* factors in Mr. Garcia's factor and against the state. App. A17-A18. As to the second factor (the reason for the delay), the trial court found that while "investigating officers did not use reasonable diligence to find Defendant, Defendant fled Missouri. This factor goes against both the State and Defendant." App. A18. Finally, in considering the fourth factor, the trial court found that Mr. Garcia "is not actually prejudiced by the delay," and after balancing all four of the *Barker*

factors, denied Mr. Garcia's motion to dismiss. App. A19.

Mr. Garcia filed a petition for a writ of mandamus before the Missouri Court of Appeals, Eastern District, seeking relief from the trial court's order. The petition for writ was denied by the Court of Appeals on April 14, 2010. App. A16.

Mr. Garcia then filed a petition for a writ of mandamus before the Supreme Court of Missouri. App. A4. The Missouri court applied the same four-factor *Barker* test employed by the trial court; both the state and Mr. Garcia agreed that the first factor (the length of the delay) and the third factor (the timely assertion of the right) should be weighed in Mr. Garcia's favor. App. A5-A8.

In considering the second factor, the Missouri court rejected the state's argument that "Garcia fled St. Louis and, therefore, should bear some responsibility for the delay in his apprehension and prosecution." App. A7. Instead, the court accepted Mr. Garcia's argument that "the state offered no evidence that he left Missouri or concealed his identity to avoid prosecution" and held the state solely responsible for the delay. App. A7. The court noted that there was no evidence that Mr. Garcia was aware of the indictment against him. "In the absence of evidence that Garcia did something wrong, this factor – the reason for the delay – weighs against the state." App. A7.

The Missouri court then considered the issue of prejudice, the final factor in the *Barker* analysis. In doing so, it relied on the Court's opinion in *Doggett v.*

United States, 505 U.S. 647 (1992), in which the Court held that a defendant's speedy trial rights had been violated even though he had not identified any prejudice resulting from the delay. Applying *Doggett* and presuming that the delay had prejudiced Mr. Garcia, the Missouri court held that the state had not proven that the delay had left Mr. Garcia's "ability to defend himself unimpaired" and therefore had not rebutted the presumption of prejudice. App. A8-A11. In a 4-3 decision, the Missouri Supreme Court held that the seven-year delay between Mr. Garcia's indictment and his arrest violated his Sixth Amendment right to a speedy trial. App. A11.

In dissent, Chief Justice William R. Price Jr., argued that the majority had used the correct test (the four-factor *Barker* test) but reached the wrong result. App. A12. Justice Price noted that the second factor "asks 'whether the government or the defendant is more to blame for the delay.'" App. A12 (quoting *Barker*, *supra*, 407 U.S. at 530). "On these facts, Garcia was more to blame; he left the jurisdiction," Justice Price observed, noting that Mr. Garcia knew he was suspected of shooting the victim in front of multiple witnesses who could identify him. App. A12. Justice Price went on to argue that the *Doggett* presumption of prejudice should not be applied if the second factor is weighed against Mr. Garcia. App. A13-A14. In such a case, with the burden of proof on Mr. Garcia (to prove prejudice) rather than on the state (to overcome a presumption of prejudice), Justice Price argued that Mr. Garcia had not affirmatively proven that the delay had prejudiced him. App. A14-A15. "Absent 'a specific showing, it is difficult to see how the disappearance

of the government's key witnesses will prejudice Garcia." App. A14-A15.

The Petitioner, State of Missouri, seeks review of the Missouri Supreme Court's decision because it distorts the Court's analysis in *Barker* relating to whether a defendant's conduct has waived a claim that his right to a speedy trial has been violated. By relieving Mr. Garcia of any responsibility for any delay in his apprehension, the Missouri court's decision expands the rights afforded by the Sixth Amendment and will allow criminal defendants to obtain dismissal of the charges against them even if they were partially responsible for the delay in their prosecution and even if they have not been actually prejudiced by the delay. Such a rule is unfair to the state, and it hinders the orderly administration of justice.

REASONS FOR GRANTING THE PETITION

The right to a speedy trial, set forth in the Sixth Amendment, is, as the Court has observed, "generically different from any of the other rights enshrined in the Constitution for the protection of the accused." *Barker v. Wingo, supra*, 407 U.S. at 519. Among the several reasons why this is so is that deprivation of the right – that is, a trial that is *not* speedy – often works to the benefit of the accused, in contrast to the denial of other constitutional rights afforded the defendant.

Accordingly, courts determining whether this right has been violated have properly been directed to examine not only the conduct of the government – the chief if not exclusive focus of inquiries into whether other constitutional rights have been violated – but also the conduct of defendants, to see whether their actions have contributed to the delay in their prosecution and, if so, whether those actions have served to waive any claim of a speedy-trial violation.

This petition should be granted for three reasons. First, the Missouri Supreme Court, having declined to hold Mr. Garcia responsible for the delay in his arrest and prosecution because there was no evidence that he "did something wrong" in fleeing the St. Louis area following the shooting, has expanded the right to a speedy trial under the Sixth Amendment by removing the waiver-doctrine underpinnings from the Court's Sixth Amendment jurisprudence. Second, this expansion of the speedy trial right will require police departments and other law enforcement authorities to expend scarce

resources to track down and apprehend suspects who have deliberately and voluntarily fled to other jurisdictions, at the risk that their failure to do so will result in the dismissal of charges against those suspects. Third, the Missouri court's decision directly conflicts with a number of decisions by several different federal circuits, among them the United States Court of Appeals for the Sixth Circuit in *Wilson v. Mitchell*, 250 F.3d 388 (6th Cir. 2001) and the United States Court of Appeals for the Fifth Circuit in *Robinson v. Whitley*, 2 F.3d 562 (5th Cir. 1993).

I. By refusing to follow *Barker v. Wingo* and *Doggett v. United States* and holding that a defendant who has shown himself to be partially responsible for the delay in his arrest and prosecution may establish a speedy-trial violation irrespective of whether he was prejudiced by the delay, the Missouri court has expanded the right to a speedy trial under the Sixth Amendment beyond the limits set forth by the Court.

When the Court in *Barker v. Wingo*, established its four-factor balancing test to determine whether a defendant's Sixth Amendment right to a speedy trial had been violated, it identified three primary ways in which the right to a speedy trial differs from other constitutional rights. First, society has an interest in providing speedy dispositions of cases that, the Court noted, exists "separate from, and at times in opposition to, the interests of the accused." *Barker v. Wingo*, *supra*, 407 U.S. at 519. Second, unlike other constitutional rights, the deprivation of the right to a speedy trial may work to the *advantage* of the

defendant, because witnesses and evidence may become unavailable to the prosecution as time passes between the commission of a crime and a trial of the accused. *Id.* at 521. Third, the Court noted perhaps the most fundamental difference between the speedy-trial right and other constitutional rights:

> ...the right to a speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate.

Id. In crafting its four-factor balancing test, the Court rejected two more rigid approaches "urged upon us as ways of eliminating some of the uncertainty which courts experience in protecting the right" to a speedy trial. *Id.* at 522-23. The Court first rejected the suggestion that it require, as a matter of constitutional right, that a criminal defendant be offered a trial within a certain specified period of time. "We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months." *Id.* at 523.

The second alternative, which the *Barker* Court called the "demand-waiver" doctrine, would have restricted consideration of speedy-trial claims to those cases in which the defendant had requested a speedy trial. *Id.* at 524-25. In rejecting this approach, the Court explained the reasoning behind what would become the four-factor *Barker* test:

> We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right. This does not mean, however, that the defendant has no responsibility to assert his right. We think the better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right. Such a formulation avoids the rigidities of the demand-waiver rule and the resulting possible unfairness in its application.

Id. at 528. Significantly, the *Barker* Court explained that the uniqueness of the speedy-trial right requires that the defendant bear some responsibility in asserting a claim that the right has been violated because of the uncertainty in ascertaining whether the speedy-trial right had been violated, in contrast to other constitutional rights in which the government must show that any waiver of the right was knowingly and voluntarily made. *Id.* at 529.

Therefore, while the *Barker* Court's four-factor test "places the primary burden on the courts and the prosecutors to assure that cases are brought to trial," *id.*, the *Barker* test allows for, and even requires, an examination of the defendant's conduct as well. "We hardly need add that if delay is attributable to the defendant, then his waiver may be given effect under standard waiver doctrine." *Id.*

The *Barker* Court's admonition that standard waiver doctrine should still be considered in the speedy-trial analysis, notwithstanding its rejection of the rigid demand-waiver rule, was rooted in a

recognition that delay may, owing to the specific details of the case, impair a defendant's ability to prepare and present a defense, or *benefit* the defendant, as in those cases when the unavailability of witnesses or evidence makes it more difficult, or impossible, for the government to meet its burden of proof. Because of the indisputable incentives for criminal defendants to delay their arrest and prosecution, their actions in causing that delay must be considered in determining whether the right to a speedy trial has been violated. *See Vermont v. Brillon*, 129 S.Ct. 1283, 1290 (2009).

Twenty years after *Barker*, the Court decided *Doggett v. United States*, and again the defendant's responsibility (or lack thereof) for the delay was at the forefront of the speedy-trial analysis. In *Doggett*, the Court considered whether the defendant was deprived of his right to a speedy trial as the result of a delay of nearly 8½ years between his indictment in a drug conspiracy and his arrest on that indictment. *Id.* at 648-50. The indictment was handed up in February 1980, and nearly a month later, law enforcement officers attempted to arrest Doggett at his parents' house, only to be told that he had left the country for Colombia four days earlier. *Id.* at 648-49. Doggett would not return to America for another 2½ years, and would not be arrested until six years after that. *Id.* at 649-50.

In addressing whether Doggett bore any responsibility for the delay, the government suggested to the Court that Doggett "knew of his indictment years before he was arrested." *Id.* at 653. If this had been true, or at least arguable from the record, the result would have been that the second

and third *Barker* factors (the reason for the delay and the timely assertion of the right, respectively) would have weighed against him. Unfortunately for the government, it had stipulated (at Doggett's conditional guilty plea) to the absence of any information that Doggett was aware of his indictment before he left the country or at any time prior to his arrest. *Id.* at 653. Nevertheless, as the Court observed in *Doggett*, the analysis of the second prong of the *Barker* test centers on "whether the government or the criminal defendant is more to blame for [the] delay," *id.* at 528, and its finding that Doggett himself was *not* to blame for the delay does not undermine that principle.

In this case, although the State did not offer proof that Mr. Garcia knew of the indictment returned against *him*, neither did it concede the fact, and more to the point has always maintained that Mr. Garcia fled from the St. Louis area specifically to avoid arrest and prosecution. The trial court, in turn, found no evidence that Mr. Garcia was aware of his indictment or the warrant for his arrest, but also found that Mr. Garcia had "fled from his home address" knowing that there had been witnesses at the scene of the crime (including the victim) and that the police would be looking for him.[1] App. A18.

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[1] The 11th Circuit has noted a distinction, for purposes of evaluating the second *Barker* factor, between violent crimes and non-violent crimes (such as making a false statement). *See United States v. Ingram*, 446 F.3d 1332, 1337-38 (11th Cir. 2006) (holding government responsible for two-year delay in the absence of evidence defendant knew of indictment or arrest warrant when "[h]is offense was not a violent crime"). At the very least, it was reasonable for the trial court to conclude that Mr. Garcia, having committed an assault with a shotgun, in a

Accordingly, the trial court found that the State (because of its lack of reasonable diligence in pursuing Mr. Garcia) *and* the defendant (because of his flight from Missouri) should bear responsibility for the delay in Mr. Garcia's arrest and prosecution, and thus the second *Barker* factor was weighed against both parties. App. A18. The trial court's analysis is further supported by the fact that, as the Missouri court noted in its opinion, "Garcia's whereabouts between the April 1998 shooting and September 2000 are unknown." App. A7. This tends to indicate not only that Mr. Garcia fled from the St. Louis area to avoid prosecution, but also that he then "lay low" for a period of time, and once he had concluded that the trail had cooled sufficiently, he resurfaced, albeit in the foreign and much larger jurisdiction of the Chicago area.

By rejecting the trial court's analysis[2] and holding the State solely responsible for the delay, the Missouri court ignored the clear direction of *Barker* and *Doggett*, which require courts to consider the extent to which defendants' own actions may cause the delays in their prosecutions in addressing the second prong of the *Barker* analysis. In its place, the Missouri court added a new requirement: a delay cannot be attributed to the defendant (and therefore weighed against the State) "in the absence of

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public place, in front of several witnesses, should have anticipated that police would promptly respond to the scene and immediately begin searching for the shooter

[2] *Doggett* suggests the Missouri court should have granted more deference to the trial court's determination that both parties were responsible for the delay. *Doggett*, *supra*, 505 U.S. at 652. *See also United States v. Walker*, 92 F.3d 714, 718 (8th Cir. 1996).

evidence that [defendant] did something wrong." App. A7.

This new requirement is without basis in Sixth Amendment jurisprudence, whether before this Court, the federal courts or the courts of Missouri. To the contrary, courts applying the *Barker* test have repeatedly held defendants responsible for delays in their capture and prosecution even when the actions taken by the defendants (resulting in the delay) are completely blameless from a moral standpoint. To mention only a few examples, defendants have been held responsible for delays resulting from their pursuit of interlocutory appeals, *United States v. Loud Hawk*, 474 U.S. 302, 316-17 (1986); the filing of a motion for a change of venue, *Wells v. Petsock*, 941 F.2d 253, 258 (3rd Cir. 1991); and a defendant's request for a mental-health evaluation, *Ringstaff v. Howard*, 885 F.2d 1542, 1543 (11th Cir. 1989).[3] Surely there is nothing "wrong" with the defendants in those and other cases requesting more time to prepare a defense, or asserting other important trial-related rights, and yet those defendants have still properly been held responsible for the attendant delays in their trials.

The effect of the Missouri court's finding that the state was solely responsible for the delay was significant in that it allowed the court to follow *Doggett* and presume that Mr. Garcia had been

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[3] Missouri courts have likewise held defendants responsible for delays resulting from these and other morally blameless reasons. *See, e.g., State v. Owsley*, 959 S.W.2d 789, 794 (Mo. 1997) (defense requests for mental-health evaluations and motion for change of judge); *State v. Bolin*, 643 S.W.2d 806, 813-14 (Mo. 1983) (defense motions to quash indictment).

prejudiced as a result of the delay. Before Doggett's case reached this Court, every court to consider the matter had found that the delay in his prosecution was attributable to negligence on the part of the government, but had ruled that Doggett was not entitled to relief because he had failed to prove any actual prejudice resulting from the delay. *Doggett*, *supra*, 505 U.S. at 650-51. The Court, however, observed that "affirmative proof of particularized prejudice is not essential to every speedy trial claim," and held that prejudice can be presumed in cases of prolonged delay owing to the negligence of the government. *Id.* at 655-56. "While not compelling relief in every case ... neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him." *Id.* at 657. Citing the government's "egregious persistence in failing to prosecute Doggett," the Court held that prejudice should have been presumed and, since the government had not "affirmatively proved that the delay left his ability to defend himself unimpaired," Doggett's speedy trial right had been violated. *Id.* at 657-58 and n.4.

In this case, the Missouri court also applied *Doggett* and presumed that Mr. Garcia had been prejudiced by the delay in his prosecution, a conclusion that was only possible if the court found the state completely responsible for the delay. Thus, the Missouri court improperly equated the failure of law enforcement, despite their efforts, to locate Mr. Garcia more promptly with the inaction by the authorities in *Doggett*, who on several occasions received specific information as to the possible whereabouts of their quarry and made no attempt to follow up on that information.

The Missouri court's finding that prejudice should be presumed, in turn, placed the burden upon the state to rebut the presumption of prejudice, rather than upon Mr. Garcia to prove he was *not* prejudiced. This allowed the Missouri court to conclude that the state had not proven that the delay left Mr. Garcia's "ability to defend himself unimpaired" as required by *Doggett*, *supra*, when prejudice is presumed. The Missouri court reached this conclusion, in part, by misquoting *Barker*. Noting that four witnesses to the shooting had disappeared while Mr. Garcia was at large, the Missouri court declared that "[i]n such a circumstance, *Barker* compels the conclusion that the prejudice to Garcia is obvious." App. A10. Viewed in its proper context, however, the language at issue makes clear that the *Barker* Court was referring to *defense* witnesses who die or disappear during a delay. *See Barker*, *supra*, 407 U.S. at 532. The Missouri court went on to note that only two of the original seven witnesses interviewed by police are currently available to identify Mr. Garcia as the shooter, and "[t]heir testimony will be to events that occurred more than 12 years ago," suggesting that their memories may be faulty owing to the passage of time. App. A10-A11. The Missouri court concluded: "Too many witnesses and too many years have slipped away for the state to carry this burden." App. A11. However, the only witnesses that have slipped away are witnesses for the state. Countless courts have applied *Barker* and held, in the prejudice analysis, that prejudice from missing witnesses, and/or witnesses with faded memories, results only when those witnesses are defense witnesses. *See United States v. Tranakos*, 911 F.2d 1422, 1429 (10th Cir. 1990) (citing cases). "The failure of a prosecution

witness's memory does not support a claim that the Sixth Amendment was violated." *Id.* Neither Mr. Garcia nor the Missouri court has identified a single witness who would have testified on his behalf but is now unavailable, or whose memory has faded, owing to the delay. *See United States v. Dirden*, 38 F.3d 1131, 1138 (10th Cir. 1994). Yet Mr. Garcia's claim that his speedy-trial rights were violated was successful because the Missouri court presumed he was prejudiced, and found the state had not overcome that presumption even though the *state*'s case had become demonstrably weaker with the passage of time.

In short, the Missouri court's decision expands the right to a speedy trial beyond the limits established by the Court, in that it removes from the balancing test set forth in *Barker* any consideration of the defendant's responsibility for the delay in his apprehension and prosecution.

II. The Missouri court's expansion of the speedy trial right will place an undue burden on law enforcement authorities and reward defendants who have deliberately and voluntarily fled to other jurisdictions.

The Missouri court's opinion will also have a detrimental effect on law enforcement, in that it requires police agencies to commit manpower and resources to hunt down and apprehend defendants who have voluntarily fled the jurisdiction, or run the risk that their failure to do so will result in the dismissal of the case. It also creates an incentive for defendants to flee the jurisdictions in which their crimes are committed, and further draws an

inappropriate distinction between those who flee and then, once in a foreign location, live openly, and those who take more affirmative steps to conceal their identity and whereabouts.

By weighing the second *Barker* factor (the reason for the delay) against the State, owing to what it termed "a lack of diligence and negligence" on the part of the Kirkwood police, the Missouri court has created a significant burden for police and other law enforcement agencies. The record before the Missouri court showed that police made a determined yet unsuccessful effort, in the weeks and months following the shooting, to locate Mr. Garcia. Subsequent to that initial effort, whenever they received information as to Mr. Garcia's whereabouts, they followed up on those leads, to no avail. Finally, Mr. Garcia was located through the efforts of one police detective who discovered that the case had gone cold and, on his own initiative, found Mr. Garcia in Chicago. None of this police work would have been necessary had Mr. Garcia not fled the scene of the crime, hid himself in parts unknown, and then made his way to Chicago where, some 2½ years later, he began to live openly. Yet the Missouri court held the police effort to find Mr. Garcia lacking, and absolved Mr. Garcia of any responsibility for the actions that made it necessary to find him in the first place.

In order to comply with the Missouri court's new standard, then, police departments and other law-enforcement agencies across the state (large and small) will have to divert scarce resources from their regular duties in order to locate defendants who have voluntarily absented themselves from the

jurisdiction. Furthermore, the Missouri court's opinion makes it clear that the police will have to do more than the Kirkwood police did in this case in order to meet this new obligation. The Ninth Circuit has observed that "[t]here is no requirement that law enforcement officials make heroic efforts to apprehend a defendant who is purposely avoiding apprehension." *United States v. Sandoval*, 990 F.2d 481, 485 (9th Cir. 1993) (quotations and citation omitted). The Missouri court's opinion, however, will require law enforcement to become a bit more heroic in their pursuit of those who avoid apprehension by fleeing the scene of the crime. If defendants remain at large despite this increased effort, or if police make the reasonable choice not to expend undue time and resources to find fugitive defendants, the effect will be the same: when the defendants are ultimately apprehended, they will be able to claim a violation of their speedy trial rights in spite of their own actions, simply because the police did not find them quickly enough.

Thus, the incentive for any defendant to absent himself from the charging jurisdiction, present enough in any case, is increased when a defendant cannot be held responsible for the delay that results from his flight. Furthermore, by focusing on the fact that (after the first 2½ years) Mr. Garcia lived openly in Chicago under his own name, the Missouri court has drawn an illogical distinction between those who flee and (eventually) make no attempt to conceal themselves in their new homes and those who take further affirmative steps, beyond the mere flight, to conceal themselves and avoid capture.

In *United States v. Mendoza*, 530 F.3d 758 (9th Cir. 2008), Judge Bybee, concurring in the result, noted a similarly perverse result from the majority's decision. The Ninth Circuit in *Mendoza* had applied the Court's decision in *Doggett*, *supra*, and held that the eight-year delay between the defendant's indictment and his arrest was attributable solely to the government's negligence. *United States v. Mendoza*, *supra* at 764-65. Significantly, the government not only knew that Mendoza had fled to the Philippines, but also had specific information as to his whereabouts there and contact information for his relatives; nevertheless, they failed to act on that information and merely put out a warrant for Mendoza's arrest so he would be arrested if he ever returned to the United States. *Id.* at 763. Because, following *Doggett*, the majority presumed that Mendoza was prejudiced by the delay and that the government had not rebutted that presumption, the Ninth Circuit held that Mendoza's speedy trial rights were violated. *Id.* at 765. Judge Bybee, concurring in the result, noted that only the *Doggett* presumption of prejudice compelled the result reached by the majority. *Id.* at 767-68 (Bybee, J., concurring). In concluding his concurrence, Judge Bybee observed:

> As the government closed in on Mendoza, he fled to the Philippines and hampered efforts to investigate and indict him. Today, however, *Mendoza* proves that under *Doggett*, you can still claim your right to a speedy trial has been violated if you run, but you don't hide.

Id. at 768. *Cf. United States v. Wanigasinghe*, 545 F.3d 595, 598 (7th Cir. 2008) (declining to apply *Doggett* presumption of prejudice when defendant

fled to Sri Lanka and left deceptive information behind as to where he was going).

The Missouri court's decision provides a similar incentive for defendants not only to flee the jurisdiction but to take further steps, once in a new location, to avoid prosecution. If Mr. Garcia, whenever he arrived in Chicago, had lived under an assumed name and a counterfeit Social Security number, presumably the Missouri court would have held him responsible for the attendant difficulties in locating and arresting him. It makes no sense to hold those who run *and* hide responsible for the delay in their capture, but not those who run and don't hide; in both cases the government will have to make efforts to locate the defendants, wherever they might be, and to bring them to justice.

In sum, the Missouri court's decision has simultaneously created an incentive for defendants to flee in order to avoid capture, and increased the burden on law enforcement to prove their diligence in attempting to locate those who are motivated by that incentive. The result will be a disruption in the orderly administration of justice.

III. The Missouri court's decision conflicts with decisions by several different federal circuits, among them the United States Courts of Appeals for the Fifth and Sixth Circuits.

The Missouri court's decision also conflicts with decisions by several federal courts.

In *Wilson v. Mitchell*, 250 F.3d 388 (6th Cir. 2001), the U.S. Court of Appeals for the Sixth Circuit

addressed what it termed a question unanswered by *Doggett*: "the extent to which a defendant's attempt to evade discovery affects the Sixth Amendment analysis." *Id.* at 395. The defendant in *Wilson* evaded capture for 22 years, partially due to, among other active measures on his part, using 13 different variations on his name, five different addresses and two Social Security numbers. *Id.* at 392. However, while there was evidence that the police actively pursued Wilson for the first six years he was at large, "there is no evidence that there was any attempt to locate Wilson thereafter" until shortly before he was arrested, some 16 years later. *Id.* Therefore, the court observed, "[w]e have an active wrongdoer (Wilson) and a passive wrongdoer (the state), both of whom are at fault for a 22-year delay between Wilson's indictment and arrest." *Id.* at 395. Accordingly, the Sixth Circuit held Wilson primarily responsible for the delay in bringing him to trial and, more relevant to this case, held that Wilson was not entitled to a presumption of prejudice under *Doggett* because he was partially responsible for the delay, and instead denied his claimed speedy trial violation because he had not proven actual prejudice. *Id.* at 395-96.

The United States Court of Appeals for the Fifth Circuit followed a similar analysis in *Robinson v. Whitley*, 2 F.3d 562 (5th Cir. 1993), holding the *Doggett* presumption of prejudice did not apply to a defendant who escaped from police custody and who was held responsible for approximately two-thirds of the total delay. "Any threat to the fairness of his trial occasioned by a delay in its commencement was obviously a risk Robinson was willing to take." *Id.* at 570. In this case, while there is no evidence that Mr.

Garcia actively tried to avoid capture to the same extent that the defendant in Wilson did, or that he escaped from police custody as the defendant in Robinson did, he nonetheless contributed to the delay in his apprehension by fleeing the St. Louis area. Contrary to the holdings in *Robinson* and *Wilson*, however, the Missouri court declined to hold Mr. Garcia responsible for this contribution to the delay, and, in turn, applied the *Doggett* presumption of prejudice where the Fifth and Sixth Circuits had not.

In *Rashad v. Walsh*, 300 F.3d 27 (1st Cir. 2002), the United States Court of Appeals for the First Circuit addressed a delay of five years and eight months between indictment and arrest in ruling on a petition for a writ of habeas corpus. For 15 of those months, following the defendant's release from jail in Texas, his whereabouts were unknown to the prosecuting authorities in Massachusetts, who concededly were aware that the defendant was incarcerated in Texas and had negligently failed to lodge a detainer against him. *Id.* at 37-38. About where he went once he was released, the court observed, "we know very little. For aught that appears, the petitioner vanished into the Bermuda Triangle." *Id.* at 38. "Consequently, we cannot estimate how easy it would have been for the Massachusetts authorities to locate him. *Id.* at 38. The First Circuit held that the Massachusetts Appeals Court had properly held this portion of the delay against the defendant. *Id.*

Following this 15-month period, the defendant returned to Massachusetts and lived under his own name; during the four months that followed, he was

stopped twice by the police for traffic violations and once posted bail for a friend, but was not arrested on his outstanding warrant for kidnapping, rape and assault until the warrant was discovered during a sweep by the Immigration and Naturalization Service. *Id.* at 32. Nevertheless, the First Circuit declined to weigh this four-month period against the government. "Although it was incumbent upon the Commonwealth to seek the petitioner with diligence ... even a diligent investigator might have taken months to uncover the fact that the petitioner had quietly returned to Massachusetts." *Id.* at 39. Similarly, in this case Mr. Garcia disappeared for a time (far longer than the 15 months unaccounted for in *Rashad*) and then quietly reappeared in Chicago, where he lived openly for several years. While the First Circuit had no problem allocating responsibility between the government (owing to its negligence in failing to lodge a detainer) and the petitioner, the Missouri court's opinion placed the entire responsibility for the delay on the police's lack of diligence without considering the fact that Mr. Garcia's actions made it much more difficult to find him.

The conflict between the Missouri court's decision and the decisions of these and other federal circuits raise a question that the Court should answer: whether a defendant who has taken affirmative steps to make his capture difficult can later claim a speedy trial violation based on a delay in his arrest by law enforcement.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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November 29, 2010

APPENDIX

SUPREME COURT OF MISSOURI
en banc

State ex rel. David T. Garcia,	)	
	)	
Relator,	)	
	)	
v.	)	No. SC 90833
	)	
The Hon. Steven H. Goldman,	)	
	)	
Respondent.	)	

ORIGINAL PROCEEDING IN MANDAMUS

Introduction

David Garcia was indicted eight years ago for a shooting that occurred 12 years ago in Kirkwood. Although he has been employed, paying taxes and living openly in Chicago for the past 10 years, the police made no serious attempt to find him until 2009, when a police officer looked him up in a computer database. After his arrest in Chicago and return to St. Louis County for trial, Garcia moved to dismiss the charge, contending that police and the prosecution violated his constitutional right to a speedy trial. The victim of the shooting was wounded seriously, but the case apparently received scant attention. In the circumstances here, the state has denied Garcia's right to a speedy trial.

Facts

Kwan Tung Tse, the owner of the Sunny China Buffet in Kirkwood, heard a knock on the kitchen door in April 1998, opened it and let in a man who entered, talked to an employee and then left. The man returned about a minute later carrying a shotgun, shot employee Rigoberto Dominguez in the abdomen and left. Dominguez was hospitalized but survived the attack.

Meliton Gonzalez, another employee at Sunny China, followed the assailant out the door after the shooting and saw him get into a brown coupe. Gonzalez identified the assailant as David Garcia. Dominguez, the victim, and Manuel Castro, another Sunny China employee, also identified the assailant as Garcia. Dominguez told police Garcia shot him because Dominguez had been talking about Garcia's girlfriend two days earlier. Kirkwood police interviewed three other witnesses around the time of the shooting: Nabor Garcia (Garcia's cousin and housemate), Jesus Rojas and Moises Aguilar.

The police found a Mossburg pump-action 12-gauge shotgun hidden in the bushes near the doorway exiting from the kitchen area. Police took photographs of the scene and prepared a diagram of the kitchen area of Sunny China. In addition, they conducted videotaped interviews of Nabor Garcia and Gonzalez. These videotapes have been lost.

Through their investigation, police obtained Garcia's date of birth, driver's license number, social security number and address. Police then searched the apartment Garcia shared with Nabor Garcia and canvassed the apartment complex. Police were told that if Garcia were to leave the St. Louis area, he might go to California or Illinois. Detective Michael

Bales testified that he could not recall any of the locations he visited after searching the Garcias' apartment and that he could not remember to whom he spoke at the apartment complex besides Nabor Garcia. Police were unable to locate David Garcia.

Nearly three years after the shooting, the St. Louis [County] prosecuting attorney's office asked Kirkwood police to make further attempts to find David Garcia, because the statute of limitations for the crime was running out. Police received information that Garcia might be in Breckenridge Hills, St. Ann or other communities in north and central St. Louis [County]. Kirkwood police sergeant Steven Guyer attempted to locate Garcia on four days in late February or early March 2001. Guyer was admitted into three residences but did not locate Garcia. No reports were prepared documenting these efforts to locate Garcia.

Garcia was charged by indictment in February 2002 with first-degree assault. The police made no efforts to look for Garcia during the next seven years; according to a Kirkwood detective, the case had become "cold."

In early 2009 Kirkwood Detective Steve Urbeck entered Garcia's social security number into the Accurint computer system and received a Chicago address for Garcia. Detective Urbeck contacted the Chicago police department's fugitive apprehension service and requested its assistance. Chicago police determined that Garcia was working at a Chicago hotel and arrested him in February 2009.

Garcia was living openly in Chicago, using his actual name, date of birth and social security number since at least 2002. The trial court found that the social security number could have been used to locate Garcia in 2002 or before. Garcia filed tax

returns from 2000 to 2008 using his real information. He opened several credit card accounts and obtained a Missouri driver's license using his St. Louis address. Garcia's whereabouts between the April 1998 shooting and September 2000 are unknown.

Garcia filed a motion to dismiss the indictment against him, alleging a violation of his right to a speedy trial under the Sixth Amendment to the United States Constitution. The parties stipulate that witnesses Nabor Garcia, Moises Aguilar, Manuel Castro and Jesus Rojas cannot be found and are currently unavailable. They also stipulate that the videotaped statements of Nabor Garcia and Meliton Gonzalez are unavailable and that Sunny China was demolished two years before Garcia's arrest. The respondent circuit court, balancing the factors discussed below and the evidence, overruled the motion to dismiss. The court found that Garcia knew that there were witnesses at the scene of the shooting, that police would be searching for him, that he fled his home address, and that there was no evidence that Garcia was aware of the indictment or arrest warrant. The court also concluded the police did not use reasonable diligence to find Garcia.

Garcia filed a petition for writ of mandamus with this Court, which issued its preliminary writ pursuant to article V, section 4 of the Missouri Constitution.[1]

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[1] This Court has the authority to "issue and determine original remedial writs" pursuant to Missouri Constitution article V, section 4.1. A writ of mandamus will issue to "compel the performance of a ministerial duty that one charged with the duty has refused to perform." *Furlong Cos. Inc. v. City of Kansas City,* 189 S.W.3d 157, 165-66 (Mo. banc 2006). "A litigant asking [sic] relief by mandamus must allege and prove

Analysis

A defendant's right to a speedy trial arises under the Sixth Amendment to the United States Constitution,[2] which applies to the states through the Fourteenth Amendment.[3] *Klopfer v. North Carolina*, 386 U.S. 213, 222 (1967). These constitutional provisions "provide equivalent protection for a defendant's right to a speedy trial." *State ex rel. McKee v. Riley*, 240 S.W.3d 720, 729 (Mo. banc 2007).

"[T]he protections of the speedy trial provisions attach when there is a 'formal indictment or information' or when 'actual restraints [are] imposed by arrest and holding to answer a criminal charge.'" *State of Missouri v. Bolin*, 643 S.W.2d 806, 813 (Mo. banc 1983) (quoting *Dillingham v. United States*, 423 U.S. 64, 65 (1975)). Garcia's right to a speedy trial accrued when he was indicted in February 2002.[4] The relevant inquiry in this case is whether the seven-year period between Garcia's indictment and arrest violated his speedy trial rights.

The determination of whether there has been a violation of speedy trial rights involves a balancing

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that he has a clear, unequivocal, specific right to a thing claimed." *Id.* at 166

[2] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."

[3] Article I, section 18(a) of the Missouri Constitution provides "[t]hat in criminal prosecutions the accused shall have the right to ... a speedy public trial by an impartial jury of the county."

[4] *Cf. United States v. Lovasco*, 431 U.S. 783, 788-89 (1977).

process. In determining whether Garcia's right to speedy trial has been violated, the Court is to consider and balance all of the circumstances and to weigh four factors: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker v. Wingo,* 407 U.S. 514, 530 (1972).

1. The length of the delay is a "triggering mechanism" because until there is a "delay [that] is presumptively prejudicial," there is no need to discuss the other factors that are part of the balancing process. *Id.* Missouri courts have found that a delay of greater than eight months is "presumptively prejudicial." *See McKee*, 240 S.W.3d at 729. The trial court found, and both parties agree, that the nearly seven-year delay in this case between Garcia's indictment and arrest is presumptively prejudicial.

2. The reason for the delay. Different weights are assigned to different reasons for a delay. *Barker*, 407 U.S. at 531. A deliberate attempt by the state to delay the trial is weighted heavily against the government, while "[a] more neutral reason such as negligence ... should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Id.* The trial court found that the police did not use reasonable diligence to find Garcia. After the grand jury indicted Garcia in February 2002, there is no evidence that the police made any effort to locate Garcia until February 2009. This is indeed a lack of diligence and negligence on behalf of the state that weighs against the state.

The trial court also found that Garcia fled from St. Louis after the shooting and that he "knew there

were witnesses at the scene and police would be searching for him." The issue is whether this action should be weighed against Garcia. The state argues Garcia fled St. Louis and, therefore, should bear some responsibility for the delay in his apprehension and prosecution. Garcia argues that the state offered no evidence that he left Missouri or concealed his identity to avoid prosecution and, therefore, that the state's negligence was the sole responsibility for the delay.

The police searched for Garcia on two occasions: once immediately after the shooting and a second time in early 2001. Garcia's whereabouts from the time of the shooting in April 1998 until his application for a job in Chicago in September 2000 are unknown. Although the police were informed that Garcia might go to California or Illinois, there is no evidence that anyone had actual knowledge that he left the state.

Garcia lived openly and notoriously throughout the entire post-indictment period, albeit in Chicago, in a foreign jurisdiction. The trial court found that he could have been found using the same method that eventually was used to find him, by inserting his social security number into Accurint, in 2002 or before. There was no evidence that Garcia knew of the indictment against him. In the absence of evidence that Garcia did something wrong, this factor – the reason for the delay – weighs against the state.

3. The third *Barker* factor is the defendant's timely assertion of his right. Garcia asserted his right to a speedy trial in December 2009, 10 months after he first found out about the indictment and was arrested. The trial court found Garcia's assertion to be "a reasonable time frame for [Garcia] to raise this

claim." Both parties agree that this factor weighs in favor of Garcia.

4. The last *Barker* factor is prejudice to the defendant resulting from the delay. There are three considerations in determining whether a delay has prejudiced the defendant: (1) prevention of oppressive pretrial incarceration; (2) minimization of anxiety and concern of the accused; and (3) limitation of the possibility that the defense will be impaired. *Bolin*, 643 S.W.2d at 815 (citing *Barker*, 407 U.S. at 532). These three considerations represent the interests of a defendant that the right to a speedy trial is intended to protect. *Barker*, 407 U.S. at 532. Courts regard the third consideration as the most serious. *Id.* "[T]he inability of a defendant adequately to prepare his case skews the fairness of the entire system. *If witnesses die or disappear during a delay, the prejudice is obvious.* There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown." *Id.* (Emphasis added). This third consideration – impairment to Garcia's defense – is the only one applicable in this case.

The impairment to his defense, Garcia argues, is threefold: (1) the disappearance of four witnesses; (2) the loss of the videotaped interviews of Nabor Garcia and Meliton Gonzalez; and (3) the demolition of the crime scene, Sunny China Buffet. The state argues, and the trial court found, that Garcia presented no evidence that he was prejudiced. Generally, prejudice must be "actual prejudice apparent on the record or by reasonable inference – not speculative or possible prejudice." *State v. Edwards*, 750 S.W.2d 438, 442 (Mo. banc 1988).

More recently, however, the United States Supreme Court allowed a speedy trial claim to stand absent particularized prejudice. *Doggett v. United States*, 505 U.S. 647 (1992). Negligence, the Supreme Court said, is not "automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him." *Id.* at 657. In *Doggett*, the defendant was indicted in February 1980 for conspiring to import and distribute cocaine. *Id.* at 648. About one month later, police officers went to the home of Doggett's parents and found out that he had left for Colombia four days earlier. *Id.* at 649. The Drug Enforcement Administration (DEA) put Doggett's name in a computer system so that he could be apprehended on his return to the United States, but the entry expired. In September 1981, the DEA learned that Doggett had been arrested in Panama. The DEA asked for Doggett to be "expelled" to the United States, but Panama did not comply with the request. Doggett was freed in July 1982 and went to Colombia. *Id.* at 649. In September 1985, he entered the United States through customs and settled in Virginia, where he married, earned a college degree, was employed and lived under his own name. In 1982, the American embassy in Panama told the State Department of Doggett's departure to Canada, but the DEA did nothing. In 1985, the DEA discovered that Doggett went to Colombia, but it made no attempt to track him down. *Id.* at 649-650. Doggett was arrested in September 1988 after a simple credit check by the marshal's service found out where he lived and worked. *Id.* at 650. Doggett sought to dismiss his indictment, claiming it violated his right to a speedy trial.

Using the *Barker* factors, the Supreme Court found that Doggett's rights were violated. The Court

readily found that the first three factors weighed against the government.[5] In analyzing *Barker*'s fourth factor, prejudice to the defendant, the Supreme Court stated that "affirmative proof of particularized prejudice is not essential to every speedy trial claim," as "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." *Id.* at 655. The Court recognized that, although the government's negligence is not weighed as heavily as deliberate actions, it is still an unacceptable reason to delay a trial. *Id.* at 657. Further, the Supreme Court said, "[c]ondoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the state's fault and simply encourage the government to gamble with the interests of criminal suspects assigned a low prosecutorial priority." *Id.* The Court ultimately concluded that "inexcusable oversights" that resulted in the delay of Doggett's arrest for six years entitled Doggett to relief even if he did not demonstrate actual prejudice. *Id.*

In this case, the state has not proven that the delay "affirmatively ... left [Garcia's] ability to defend himself unimpaired" as required to rebut the presumption of prejudice. *Id.* Four witnesses to the shooting, Nabor Garcia, Moises Aguilar, Manuel Castro and Jesus Rojas, have disappeared. In such a circumstance, *Barker* compels the conclusion that the prejudice to Garcia is obvious. 407 U.S. at 532. Of the seven witnesses to the shooting that police

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[5] In analyzing the "reason for the delay," the court attributed the entire reason to the negligence of the government. There was no discussion of whether Doggett's actions constituted "flight." *Doggett*, 505 U.S. at 652-53.

identified, four are missing and a fifth, Kwan Tung Tse, the owner of Sunny China, described the shooter but did not identify him by name. Only two witnesses, Dominguez (the victim) and Gonzalez, appear to be available to testify as to the assailant's identity. Their testimony will be to events that occurred more than 12 years ago. The state must show that Garcia's defense was unimpaired. Too many witnesses and too many years have slipped away for the state to carry this burden.

Conclusion

The seven-year delay between the indictment and Garcia's arrest violates his right to a speedy trial under the Sixth Amendment to the United States Constitution. The circuit court should have dismissed the indictment. The Court's preliminary writ of mandamus is made permanent.

Michael A. Wolff, Judge

Teitelman, Russell and Stith, JJ., concur;
Price, C.J., dissents in separate opinion filed;
Breckenridge and Fischer, JJ., concur in opinion of Price, C.J.

SUPREME COURT OF MISSOURI
en banc

State ex rel. David T. Garcia,	)	
	)	
Relator,	)	
	)	
v.	)	No. SC 90833
	)	
The Hon. Steven H. Goldman,	)	
	)	
Respondent.	)	

DISSENTING OPINION

Because Garcia deliberately fled the state, he is the principal cause of the police's delay in locating him. Therefore, he was required to show that actual prejudice resulted from the delay, and he was unable to do so. I respectfully dissent.

The United States Supreme Court set out the four-factor test for evaluating a speedy trial claim in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). While the majority uses the correct test, it reaches the wrong result. The second *Barker* factor asks "whether the government or the defendant is more to blame for the delay." *Id.* On these facts, Garcia was more to blame; he left the jurisdiction. Garcia knew he was suspected of shooting Dominguez at a Chinese restaurant in front of witnesses who could identify him. He knew police would be looking for him. Still, he fled to Chicago. No one alleges here that the police acted in bad faith. *See Smith v. Hooey*, 393 U.S. 374, 383 (1969) (government only has duty to make diligent, good faith effort). Even if the Kirkwood police were not "a model of prosecutorial

initiative and concern," when a defendant leaves the jurisdiction after committing a crime, he cannot later claim that his right to a speedy trial was violated. *State v. Black*, 587 S.W.2d 865, 877 (Mo. App. 1979) (government's delay is weighed against complete lack of actual prejudice to defendant resulting from it); *Reynolds v. Leapley*, 52 F.3d 762, 764 (8th Cir. 1995) (no speedy trial violation occurred where "most of the nine year delay was caused by the fact that [the defendant] fled the jurisdiction following his offense"); *United States v. Escamilla*, 244 F.Supp.2d 760, 765-6 (S.D. Texas 2003) (no speedy trial violation occurred where, even though the government's efforts to find defendant were negligent, defendant was still the principal cause of the delay).

There is no requirement that the government make "heroic efforts to apprehend a defendant who is purposely avoiding apprehension." *Rayborn v. Scully*, 858 F.2d 84, 90 (2nd Cir. 1988). The majority ignores the plain fact that police departments have limited resources. Worse, the majority creates further incentive for criminal defendants to conceal themselves from justice. *United States v. Salzmann*, 548 F.2d 395, 404 (2nd Cir. 1976) (Feinberg, J., concurring) (allowing criminal defendants who successfully escape detection to bring speedy trial claims sanctions game playing). It was Garcia, not the state, who was the principal cause of the delay.

Because the second *Barker* factor weighs against Garcia, he is not entitled to a presumption of prejudice when the Court considers the fourth factor. *Wilson v. Mitchell*, 250 F.3d 388 (6th Cir. 2001) (defendant not entitled to presumption of prejudice because he was partially responsible for the delay); *Robinson v. Whitley*, 2 F.3d 562, 570 (5th Cir. 1993)

(*Doggett* presumption of prejudice not applicable to defendant who contributed two-thirds of total delay); *Reynolds*, 52 F.3d at 770; *United States v. Bergfeld*, 280 F.3d 486 (5th Cir. 2002); *United States v. Cardona*, 302 F.3d 494 (5th Cir. 2002).

The Sixth Amendment contemplates three harms arising from excessive trial delay: "oppressive pretrial incarceration," "anxiety and concern of the accused," and "the possibility that the defense will be impaired." *Barker,* 407 U.S. at 532. Because Garcia was never incarcerated and because he claims he did not know about the charges against him, the "only harm to petitioner from the lapse of time was potential prejudice to his ability to defend his case." *Doggett v. United States*, 505 U.S. 647, 658-9 (1992) (O'Connor, J., dissenting). The majority concedes that *speculative* or *possible* prejudice is not enough. Majority opinion at 8 (quoting *State v. Edwards*, 750 S.W.2d 438, 442 (Mo. banc 1988); *Doggett,* 505 U.S. at 667 (Thomas, J., dissenting) (government negligence and possible prejudice not enough for a speedy trial violation).

Yet Garcia made no attempt to show actual prejudice, and for reason. He, like all criminal defendants, enjoys a presumption of innocence. According to the parties' stipulation, four witnesses are now unavailable, two videotaped witness statements cannot be located, and the Chinese restaurant where Garcia shot Dominquez no longer exists.[1] But it is *the state* that has to prove its case beyond a reasonable doubt. Absent a specific showing, it is difficult to see how the disappearance

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[1] However, much evidence does still exist – among it, the gun used in the shooting, original crime scene photos, and the victim's testimony.

of the government's key witnesses will prejudice Garcia. At minimum, "delay is a two-edged sword." *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986) (the passage of time may make it difficult or impossible for the state to carry its burden); *Barker*, 407 U.S. at 521 (unlike other constitutional rights, the deprivation of the right to a speedy trial may work to the accused's advantage). Further, the seven-year delay – in itself – does not prove prejudice. The Eighth Circuit has found even a 19-year delay to not violate the Sixth Amendment. *See United States v. Wangrow*, 924 F.2d 1434 (8th Cir. 1991). It is undisputed that Garcia did not demonstrate actual prejudice. The second and fourth *Barker* factors weigh in favor of the state.

Mandamus is an extraordinary remedy. Because Garcia has not shown that he has a "clear and unequivocal right" to relief, I would quash the writ. *McKee v. Riley*, 240 S.W.3d 720, 725 (Mo. banc 2007).

William Ray Price, Jr., Chief Justice

In the Missouri Court of Appeals
Eastern District
WRIT DIVISION ONE

STATE OF MISSOURI EX REL., DAVID T. GARCIA,	)	No. ED94600
Relator,	)	Writ of Mandamus
vs.	)	Circuit Court of St. Louis County
THE HONORABLE STEVEN H. GOLDMAN, JUDGE, CIRCUIT COURT, 21ST JUDICIAL CIRCUIT, MISSOURI,	)	Cause No. 2198R-02006-01
Respondent.	)	

ORDER

Relator has filed a Writ of Mandamus along with suggestions in support and exhibits. Respondent has filed suggestions in opposition to the petition.

Being duly advised in the premises, the Court DENIES Relator's petition for Writ of Mandamus.

SO ORDERED:

DATED: April 14, 2010

GEORGE W. DRAPER III
Writ Division One
Missouri Court of Appeals
Eastern District

STATE OF MISSOURI)
)
COUNTY OF ST. LOUIS)

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS,
STATE OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Plaintiff	)	Cause No. 2198R-2006
	)	
vs.	)	Division No. 12
	)	
DAVID GARCIA,	)	
	)	
Defendant	)	

ORDER ON DEFENDANT'S MOTION TO DISMISS FOR VIOLATION OF SPEEDY TRIAL RIGHTS AND TO DISMISS COUNT II FOR VIOLATION OF STATUTE OF LIMITATIONS

The Court, after hearing evidence and after reviewing briefs of the parties, denies Defendant's Motions for Dismissal for Speedy Trial and Statute of Limitations reasons. [* * *]

With respect to Mr. Garcia's speedy trial claim, stipulated evidence shows that the length of the delay from the time of the Indictment on February 21, 2002 to the arrest for the Indictment on February 19, 2009 is almost seven years. The Court must balance four factors to determine if Mr. Garcia's Sixth Amendment right to a speedy trial was violated. *Barker v. Wingo*, 92 S.Ct. 2182 (1972). The

length of this delay creates the presumption of prejudice.

In determining the reasons for the delay, the evidence indicates that Defendant was first arrested for the assault charges herein on February 19, 2009. There is no evidence that he was aware of the Indictment or the subsequent arrest warrant. Police officers searched for and did not find Defendant at his St. Louis address or elsewhere immediately after [the] shooting until his arrest. A wanted was issued by the Kirkwood Police Department in April of 1998. The arrest warrant issued at the time of the Indictment was entered into the law enforcement database system. Defendant fled from his home address. There is sufficient evidence showing that Defendant knew there were witnesses at the scene, including the victim, and that police investigators would be searching for him. Records indicate that the Defendant applied for a job at a Chicago Marriott on September 22, 2000. He also filed his income tax returns from a Chicago address for 2000 through 2008. He applied for a Missouri driver's license from a St. Louis address on December 31, 2001. In February 2009, a Kirkwood police officer found Defendant in Chicago through the use of his social security number. (Exhibit A) This could have been done in 2002 or before. Although investigating officers did not use reasonable diligence to find Defendant, Defendant fled Missouri. This factor goes against both the State and the Defendant.

Defendant asserted his speedy trial right [in] December, 2009. This is a reasonable time frame for Defendant to raise this claim, if he did not know of the Indictment and arrest warrant until February 19, 2009. This factor weighs in favor of Defendant.

Because Defendant fled, prejudice to him from the delay must be considered. There is no evidence from the reports of interviews of witnesses that unavailable witnesses or evidence would materially help Defendant. Defendant is not actually prejudiced by the delay.

On balance of the above factors and evidence, the Court denies Defendant's Motion to Dismiss for Undue Delay.

SO ORDERED:

_____

Steven H. Goldman
Judge, Division 12

Entered this 26th day of March, 2010.

Supreme Court of Missouri

en banc

August 31, 2010

* * *

MOTIONS FOR REHEARING

* * *

SC90833 State ex rel. David T. Garcia, Relator, vs. the Honorable Steven H. Goldman, Respondent.
Respondent's motion for rehearing overruled.

* * *

Day - to - Day,

_____

William Ray Price, Jr., Chief Justice

No. 10-718

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI,

Petitioner,

v.

DAVID T. GARCIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSOURI

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a criminal defendant asserting a violation of his Sixth Amendment right to a speedy trial may rely on the presumption of prejudice recognized in *Doggett v. United States*, 505 U.S. 647 (1992), where the defendant left the state prior to his indictment and lived openly and notoriously in another state during the post-indictment period without knowledge of the charges pending against him, the state did not search for the defendant for seven years after his indictment, and the state could have located the defendant at the time of his indictment if it had pursued him with reasonable diligence.

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OPINION BELOW

The opinion of the Missouri Supreme Court (Pet. A1-A15) is reported at 316 S.W.3d 907.

JURISDICTION

On August 31, 2010, the Missouri Supreme Court entered an order denying petitioner's motion for rehearing. (Pet. A20). Missouri filed the petition for writ of certiorari on November 29, 2010. Accordingly, this Court has jurisdiction under 28 U.S.C. § 1257(a).

STATEMENT

On February 21, 2002, a grand jury returned an indictment charging David Garcia with first degree assault and armed criminal action in connection with a 1998 shooting. R. at 2-4 (Exh. 2).[1] On February 19, 2009, seven years after the indictment and eleven years after the shooting, Garcia was arrested. R. at 26 (Exh. 5, Tr. 65).

Garcia moved to dismiss the indictment on the ground that the state violated his Sixth Amendment right to a speedy trial by failing to bring him to trial promptly after he was indicted. R. at 5-6 (Exh. 3). The following evidence was adduced at the hearing on the motion to dismiss.

On April 9, 1998, Rigoberto Dominguez was shot while working at the Sunny China Buffet in Kirkwood, Missouri. R. at 45-50 (Exh. 6-A). The assailant entered the restaurant's kitchen through a back door, approached Mr. Dominguez, and fired a single shot into his side. *Id.* The assailant departed through the same door he had entered and was last seen driving away in a brown coupe or sedan. *Id.*

Police officers interviewed restaurant employees Meliton Gonzalez, Nabor Garcia, Manuel Castro, Jesus Rojas, and Moises Aguilar. R. at 46-49, 54-55 (Exh. 6-A). Based on these interviews, the officers identified David Garcia as a suspect in

[1] Record citations other than those to the petition or its appendix are to the exhibits submitted with Garcia's petition for writ of mandamus filed in the Missouri Supreme Court. Each citation lists the page number where the evidence supporting the factual assertion appears, followed by the exhibit number. Where the citation is to the hearing transcript, the specific page number of the transcript is also provided.

the shooting. *Id.*; R. at 18 (Exh. 5, Tr. 33). The officers obtained information to help them locate Garcia, including his full name, date of birth, home address, and social security number. R. at 27 (Exh. 5, Tr. 66).

Several hours after the shooting, Detective Bales conducted videotaped interviews of Nabor Garcia, who is the respondent's cousin, and Meliton Gonzalez. R. at 27 (Exh. 5, Tr. 68); R. at 61-64 (Exh. 6-A). The police department has since lost these videotaped statements. R. at 41 (Exh. 6).

Later on the day of the shooting, Detective Bales and an officer fluent in Spanish searched the apartment Nabor and David Garcia shared. R. at 23 (Exh. 5, Tr. 50). They did not find David Garcia. R. at 23-24 (Exh. 5, Tr. 53-54). The officers spoke with neighbors residing in nearby apartments. R. at 24 (Exh. 5, Tr. 54). Detective Bales began "to get a sense that maybe [Garcia] wasn't around anymore or the possibility he was going to be leaving." R. at 23 (Exh. 5, Tr. 50). Consequently, the police "tried to do as much as [they] could over the next 24 hours to see if [they] could find him." *Id.*

Detective Bales could not recall any of the locations he visited after searching Garcia's apartment. R. at 25 (Exh. 5, Tr. 60). And other than Nabor Garcia, Detective Bales could not remember the name of anyone he spoke to at the apartment complex. R. at 25 (Exh. 5, Tr. 59, 61).

Detective Bales described the steps he took to locate Garcia after the day of the shooting. "For the most part," he made phone calls "trying to follow up with

people we had talked with to see if they knew or had heard of where David Garcia may have been." R. at 24 (Exh. 5, Tr. 54). Detective Bales was told "that if [Garcia] were going to leave the area . . . California or Illinois would be possible locations where he could go to."[2] R. at 24 (Exh. 5, Tr. 54). These efforts, however, failed to generate "any solid leads." R. at 24 (Exh. 5, Tr. 55). When asked by the prosecutor for the names of individuals he followed up with, Detective Bales responded, "I wouldn't have that information. I do not know." R. at 24 (Exh. 5, Tr. 57).

Nearly three years after the shooting, a representative from the prosecutor's office contacted the Kirkwood Police Department. R. at 14 (Exh. 5, Tr. 17). The representative explained that the statute of limitations was "an issue" and "wanted efforts made to locate and arrest Garcia." R. at 16 (Exh. 5, Tr. 24).

In late February or early March 2001, Sergeant Guyer and his partner attempted to locate Garcia on three consecutive days one week and a single day the following week. R. at 14-15 (Exh. 5, Tr. 17-19). Their attempts amounted to "a knock and see what we could find out at the door." R. at 16 (Exh. 5, Tr. 23). Sergeant Guyer did not recall the addresses of any of these residences or the names of anyone who answered the door. R. at 16-17 (Exh. 5, Tr. 25-26). At three of the residences, someone answered the door and permitted Sergeant Guyer to search for

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[2] In his police report, Detective Bales noted that he visited Mr. Dominguez at the hospital a week after the shooting. R. at 65 (Exh. 6-A). Mr. Dominguez, who had been hospitalized since the shooting, told Detective Bales that he believed Garcia was no longer in the area. *Id.* He thought Garcia might be in Chicago, Kansas, or California because Garcia has relatives in these areas. *Id.*

Garcia. R. at 14-15, 17 (Exh. 5, Tr. 17-18, 27). The police obtained no new leads regarding Garcia's whereabouts. R. at 15 (Exh. 5, Tr. 19).

Although Missouri law[3] and department policy required police officers to prepare reports of their investigative activities, neither Sergeant Guyer nor Detective Bales (the only police officers who testified at the hearing) prepared written reports documenting their purported efforts to locate Garcia. R. at 15, 26 (Exh. 5, Tr. 21, 63-64). Sergeant Guyer explained that he did not write a report because he "didn't think it was pertinent." R. at 15 (Exh. 5, Tr. 21).

On February 21, 2002, nearly four years after the alleged shooting, a grand jury indicted Garcia for first degree assault and armed criminal action. R. at 2-4 (Exh. 2). But the indictment failed to stir anyone in the Kirkwood Police Department or the prosecutor's office. The case had become "cold," although Detective Bales said that if he had "received a tip or a lead that the defendant was in a certain location," he would have "[d]efinitely followed up with it." R. at 24 (Exh. 5, Tr. 55-56). For the next seven years the police did not look for Garcia anywhere, and the case became dormant.

During the entire post-indictment period, Garcia lived openly and notoriously in Chicago. In September 2000, Garcia was hired to work as a valet at the Renaissance Hotel on One West Wacker Drive in Chicago, Illinois. R. at 203, 227, 232 (Exh. 6-D). When he applied for the position and throughout the course of his

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[3] *See* Mo. Rev. Stat. § 610.100.2 ("Each law enforcement agency of this state, of any county, and of any municipality shall maintain records of all incidents reported to the agency, investigations and arrests made by such law enforcement agency.").

employment, Garcia provided his real name, date of birth, and social security number—information that the police obtained on the day of the shooting and that was recited in the indictment. R. at 2 (Exh. 2); R. at 49 (Exh. 6-A); R. at 185-204, 232 (Exh. 6-D). From 2000 to 2008, Garcia filed tax returns bearing his real name and social security number and listing his Chicago address. R. 80-183 (Exh. 6-C). While residing in Chicago, Garcia engaged in numerous everyday activities using his own name. He opened credit card accounts, bought appliances, registered his automobile with the city, and sought medical treatment. R. at 348-92 (Exh. 6-F).

Although the Kirkwood police had access to substantial resources to locate suspects, few were used to find Garcia. R. at 19, 28 (Exh. 5, Tr. 37, 70). Officers did not try to find Garcia by searching social security, immigration, tax, telephone, or utility records. R. at 19, 27 (Exh. 5, Tr. 36-37, 69). No credit bureau check was run on Garcia. R. at 19, 28 (Tr. 37, 70). The police did not reach out to the Fugitive Division of the St. Louis County Police Department, the FBI, the United States Attorney's Office, immigration agents, or social security officials. R. at 20, 28 (Exh. 5, Tr. 38, 70-71). The police did not try to ascertain Garcia's whereabouts by speaking to his landlord or by contacting the post office to see if Garcia left a forwarding address. R. at 21, 25, 28 (Exh. 5, Tr. 45, 61, 70).

In February 2009, Detective Urbeck noticed that the case was still active and that Garcia had never been located. R. at 76 (Exh. 6-A). Detective Urbeck typed Garcia's social security number into the Accurint computer system and obtained a

Chicago address listing for Garcia. *Id.*[4] Detective Urbeck contacted the Fugitive Apprehension Section of the Chicago Police Department to seek assistance in apprehending Mr. Garica. *Id.* Two days later, Garcia was taken into custody without incident when he reported to work at the Renaissance Hotel. *Id.*

The parties stipulated to the following facts: (1) witnesses Nabor Garcia, Moises Aguilar, Manuel Castro, and Jesus Rojas cannot be found and are currently unavailable despite Garcia's diligent efforts to locate them; (2) the videotaped statements of Meliton Gonzalez and Nabor Garcia cannot be found by law enforcement and are unavailable for production to the defense; and (3) the building known as the Sunny China Buffet was demolished approximately two years before Garcia's arrest. R. at 41-42 (Exh. 6).

- **The Trial Court's Ruling**

In determining whether the state violated Garcia's right to a speedy trial, the trial court considered the following factors the Court identified in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant. The court decided the first and third factors weighed in Garcia's favor, finding that the seven-year delay between Garcia's indictment and arrest was presumptively prejudicial and that Garcia asserted his right to a speedy trial within a reasonable time because he was not aware of his indictment before he was arrested. Pet. A18.

[4] This is the first time the police learned that Garcia had moved out of Missouri. Pet. A7.

With respect to the second *Barker* factor, the trial court concluded that Garcia and the state shared responsibility for the pretrial delay. *Id.* The court found that Mr. Garcia did not know he had been indicted prior to his arrest. *Id.* The court determined that the police "did not use reasonable diligence to find Defendant" and could have located Garcia "in 2002 or before" if they had performed a computerized search using his social security number as was done in 2009. *Id.* The trial court found that Garcia also was responsible for the delay because he "fled from his home address" knowing "there were witnesses at the scene, including the victim, and that police investigators would be searching for him." *Id.*

With respect to the fourth *Barker* factor, the trial court found that Garcia had not demonstrated the delay caused actual prejudice to his defense because "[t]here is no evidence from the reports of interviews of witness" prepared by police officers immediately after the shooting "that unavailable witnesses or evidence would materially help Defendant." Pet. A19.

Balancing these factors, the court concluded that Garcia was not entitled to relief. *Id.*

- **The Missouri Supreme Court's Decision**

The Missouri Supreme Court concluded that the state violated Garcia's right to a speedy trial. It determined that the state was responsible for the pretrial delay due to its failure to pursue Garcia with reasonable diligence: "After the grand jury indicted Garcia in February 2002, there is no evidence that the police made any

effort to locate Garcia until February 2009. This is indeed a lack of diligence and negligence on behalf of the state that weighs against the state." Pet. A6.

In weighing the "reason for delay" factor, Missouri Supreme Court rejected the state's argument that Garcia was responsible for the delay. It noted that without knowledge of his indictment, Garcia moved to Chicago, where he "lived openly and notoriously throughout the entire post-indictment period." Pet. A7. Garcia's presence in Chicago did not prevent the state from apprehending him, the court observed, due to the trial court's finding that the police could have found him in 2002 or before "using the same method that eventually was used to find him." Pet. A7.

With respect to the prejudice factor, the Missouri Supreme Court held that Garcia was not required to prove the delay caused actual prejudice to his defense. Pet. A9-A11. Due to the extraordinary length of the delay, the Missouri Supreme Court concluded that Garcia could rely on the presumption that the delay impaired his defense and that he would be entitled to relief unless the state "prove[d] that the delay 'affirmatively . . . left [Garcia's] ability to defend himself unimpaired' as required to rebut the presumption of prejudice." Pet. A10 (quoting *Doggett v. United States*, 505 U.S. 647, 657 (1992)). The state failed to rebut the presumption because four witnesses to the shooting were no longer available and the testimony of the other witnesses would "be to events that occurred more than 12 years ago." Pet. A11. Under these circumstances, the Missouri Supreme Court ruled that "[t]oo

many witnesses and too many years have slipped away for the state to carry [its] burden" to rebut the presumption that the delay impaired Garcia's defense. Pet. A11.

REASONS FOR DENYING THE WRIT

In determining whether a defendant's constitutional right to a speedy trial has been violated, courts must balance the following factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right; and (4) the prejudice to the defendant caused by the delay. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). None of the factors are regarded as "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." *Id.* at 533. Because "*Barker's* formulation 'necessarily compels courts to approach speedy trial cases on an *ad hoc* basis,'" the Court ordinarily will decline to review the balance struck by lower courts in close cases. *Vermont v. Brillon*, 129 S.Ct. 1283, 1291 (2009) (quoting *Barker*, 407 U.S. at 530).

The Missouri Supreme Court correctly held that the state violated Garcia's constitutional right to a speedy trial where, as here, the state made no effort to apprehend him for seven years after he was indicted and the state failed to rebut the presumption of prejudice arising from the extraordinary pretrial delay. The ruling is extremely narrow and provides that once a suspect is indicted, law enforcement agents must use reasonable diligence to apprehend the suspect and

bring him to trial. The court did not require the state to allocate a certain level of personnel or resources to apprehend criminal suspects.

This decision does not conflict with any of those that the State of Missouri cites in which courts have no Sixth Amendment violation. In each of those cases, the defendant was aware of the charges pending against him and evaded law enforcement agents to avoid prosecution. Garcia, in contrast, was unaware of the charges against him and did not attempt to conceal his whereabouts during the entire post-indictment period.

I. The Missouri Supreme Court correctly applied *Barker v. Wingo* and *Doggett v. United States* in holding that the state deprived Garcia of his right to a speedy trial.

Missouri bears the burden of justifying the seven-year delay between Garcia's indictment and arrest. *Barker*, 407 U.S. at 531 (explaining that the second factor focuses on "the reason the government assigns to justify the delay"); *Jackson v. Ray*, 390 F.3d 1254, 1261 (10th Cir. 2004) (stating that every circuit court that has addressed the issue "has held that *Barker* places the burden to explain the delay on the State") (collecting cases). The second *Barker* factor is weighted heavily in favor of the defendant when the government "deliberate[ly] attempt[s] to delay the trial in order to hamper the defense." *Barker*, 407 U.S. at 531. When a pretrial delay is caused by the government's negligence, the second *Barker* factor "should be weighted less heavily but nevertheless should be considered since the ultimate

responsibility for such circumstances must rest with the government rather than with the defendant." *Id.* The pertinent inquiry is "whether the government or the criminal defendant is more to blame for [the] delay." *Doggett v. United States*, 505 U.S. 647, 651 (1992).

The petitioner contends that the Missouri Supreme Court improperly expanded the speedy trial right by disregarding the "waiver-doctrine underpinnings" of this Court's Sixth Amendment jurisprudence. Pet. 9. The petitioner maintains that the court should have applied the waiver doctrine and held Garcia partially responsible for the pretrial delay because he left the jurisdiction. Pet. 8. According to Missouri, the court misapplied *Barker* and *Doggett* by eliminating "any consideration of the defendant's responsibility for the delay in his apprehension and prosecution" from *Barker's* balancing test and instead focusing on the lack of evidence that Garcia "did something wrong." Pet. 15-17, 19.

Missouri's argument suffers from several serious flaws. Missouri overlooks the significance of the timing of the indictment as well as Garcia's ignorance of the indictment prior to his arrest. The Speedy Trial Clause of the Sixth Amendment is not triggered until the defendant is indicted, arrested, or otherwise officially accused. *United States v. MacDonald*, 456 U.S. 1, 6-7 (1982) (stating that "no Sixth Amendment right to a speedy trial arises until charges are pending"); *United States v. Erenas-Luan*, 560 F.3d 772, 776 (8th Cir. 2009) (stating that the right to a speedy trial "attaches at the time of arrest or indictment, whichever comes first"). Garcia,

therefore, could not have asserted a violation of his right to a speedy trial until he was indicted in 2002, after he had already taken up residence in Chicago and the police had stopped looking for him.[5]

Moreover, since Garcia did not know of his indictment before he was arrested in 2009, he could not have waived his right to a speedy trial by failing to assert it sooner. *Barker*, 407 U.S. at 525 (stating that a waiver requires the "intentional relinquishment or abandonment of a ***known*** right") (quoting *Johnson v Zerbst*, 304 U.S. 458, 464 (1938)) (emphasis added). Moreover, "[c]ourts should indulge every reasonable presumption against waiver, and they should not presume acquiescence in the loss of fundamental rights." *Id.* (internal quotations and citations omitted). Until he learned of the charges pending against him, Garcia could not have known he had a right to demand a speedy trial on those charges. *See Doggett*, 505 U.S. at 653 (stating that a defendant who was unaware of his indictment could not be faulted for not asserting his right to a speedy trial prior to his arrest). Accordingly, the waiver doctrine is inapplicable and has no bearing on Garcia's claim.

The Missouri Supreme Court correctly weighed the second *Barker* factor in Garcia's favor based on the state's complete failure to look for Garcia for seven years after he was indicted. *Doggett* involved strikingly similar circumstances and is directly on point. On February 22, 1980, Doggett was indicted for conspiracy to import and distribute cocaine. *Doggett*, 505 U.S. at 648. When officers arrived at

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[5] A request for speedy trial made prior to formal commencement of a criminal case is considered premature. *Rashad v. Walsh*, 300 F.3d 27, 39 (1st Cir. 2002).

his parent's home a month later to arrest him, Doggett's mother told them that her son had left for Colombia four days earlier.[6] *Id.* at 648-49. To catch Doggett if he returned to the United States, the DEA notified all United States Customs stations and a number of law enforcement organizations of the arrest warrant and placed Doggett's name in the NCIC computer system. *Id.* at 649.

After living in South America for two and one-half years, Doggett reentered the United States on September 25, 1982, without being detected by the authorities. *Id.* He settled in Virginia and lived openly under his own name. *Id.* He married, earned a college degree, and was employed as a computer operations manager. *Id.* The government assumed that Doggett had settled in Colombia and made no effort to confirm his residency or to track him down. *Id.* at 650. In September 1988, the U.S. Marshal's Service found Doggett when it ran a simple credit check on several thousand people with outstanding arrest warrants. *Id.* Doggett's home and work addresses were obtained within minutes, and he was arrested. *Id.*

The Court concluded that the government was responsible for most of the delay between Doggett's indictment and arrest. While it did not fault the government for the two and one-half year delay resulting from Doggett's presence in South America, the Court determined that the government failed to provide a reasonable explanation for the six-year delay in apprehending Doggett after he returned to the United States. The Court observed: "For six years, the

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[6] The government stipulated that there was no evidence that Doggett knew he had been indicted prior to his arrest. *Doggett*, 505 U.S. at 653.

Government's investigators made no serious efforts to test their progressively more questionable assumption that Doggett was living abroad, and, had they done so, they could have found him within minutes." *Id.* at 653.

The facts of this case are nearly identical. Like Doggett, Garcia left the jurisdiction in which he was initially sought by law enforcement officers. For years, law enforcement officers did not look for either defendant anywhere. Both defendants were apprehended quickly after simple, yet highly effective, investigative techniques revealed their whereabouts. A credit check did in Doggett; a computerized search got Garcia. In both cases, the reviewing court determined that law enforcement officers could have found the defendant years earlier if they had employed the same technique that ultimately led to the defendant's arrest. *Doggett*, 505 U.S. at 653; Pet. A7.

This case presents an even stronger example of official negligence than *Doggett* because the state did not pursue Garcia at all for many years after his indictment. The federal authorities tried to apprehend Doggett shortly after he was indicted. Moreover, Doggett moved to a foreign country where the government would have encountered difficulty not only locating him but also securing his extradition. During the entire post-indictment period, Garcia lived openly in Chicago and was always within reach of the police if only they had looked for him.

Missouri contends that *Doggett* is distinguishable because the authorities in *Doggett* "received specific information as to the possible whereabouts of their quarry

and made no attempt to follow up on that information." Pet. 17. While the federal agents did receive information regarding Doggett's location in South America, the Court did not blame the government for the post-indictment delay attributable to the two and one-half years Doggett resided outside of the United States. The Court held the government responsible for the period of the delay beginning with Doggett's return to the United States. Just as the government had to explain the reason for the six-year delay in bringing Doggett to trial after he settled in Virginia, Missouri had to justify the seven-year delay in apprehending Garcia. And Missouri had an advantage over the federal government in locating its quarry. While the federal agents did not know where Doggett may settle if he returned to the United States, the Kirkwood police received information that Garcia had relatives living in Illinois and may go there. Yet, until 2009, the Kirkwood police did nothing to follow up on that lead.

Missouri also argues that *Doggett* is distinguishable because the government stipulated that Doggett did not know he had been indicted prior to his arrest while the Missouri prosecutor did not concede that Garcia was unaware of his indictment. Pet. 14. This argument ignores the ramifications of the trial court's finding that Garcia did not learn of his indictment until he was arrested. This finding, which the state did not challenge, is entitled to deference and is analogous to the government's stipulation in *Doggett*.

Missouri maintains it has always alleged that Garcia left Missouri to avoid arrest and points to the trial court's finding that Garcia "'fled from his home address' knowing that there had been witnesses at the scene of the crime (including the victim) and that the police were looking for him." Pet. 14. The Missouri Supreme Court decided that Garcia was not responsible for the delay in light of the trial court's finding that the seven-year delay could have been avoided if the police had diligently pursued Garcia.[7]

Missouri failed to satisfy its burden of justifying the delay and did not present sufficient evidence to support a finding that Garcia fled the jurisdiction. The evidence the prosecution presented that Garcia left Missouri immediately after the shooting was that the police did not find him at his apartment on the night of the shooting and that his neighbors did not know where he was. The only other

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[7] Citing *United States v. Ingram*, 446 F.3d 1332 (11th Cir. 2006), Missouri argues that the second *Barker* factor should be analyzed differently when a suspect is accused of committing a violent offense rather than a non-violent offense. *Ingram* does support this proposition. The court did not hold that the government would not have been responsible for the pretrial delay if Ingram had been charged with a violent crime instead of a non-violent one. The court's purpose in noting that Ingram had been charged with a non-violent felony (making a false statement) was to explain why Ingram had no reason to believe that the ATF agent who interviewed him and to whom he told that he mistakenly filled out the form containing the false statement still planned on arresting him four years later. *Id.* at 1337. The court appears to be suggesting that since the crime was non-violent and required proof of Ingram's intent, Ingram could have reasonably believed the agent accepted his inculpatory explanation and declined to pursue the charges.

To overcome the consequences of the finding that Garcia was not aware of his indictment, Missouri argues "it was reasonable for the trial court to conclude that Mr. Garcia, having committed an assault with a shotgun, in a public place, in front of several witnesses, should have anticipated that police would . . . begin searching for the shooter." Pet. 14-15 n.1. Such a rule finds no support in the law, perhaps because it would allow the state to defeat the defendant's constitutional right to a speedy trial by stripping him of another fundamental right, the right to be presumed innocent. Moreover, Missouri's position has been rejected in situations where the defendant actually knows of the charges against him and goes into hiding. Even when the defendant is a fugitive, courts have held that the government still has a duty to pursue the defendant with reasonable diligence. *See, e.g., Rayborn v. Scully*, 858 F.2d 84, 90 (2nd Cir. 1988); *United States v. Mitchell*, 957 F.2d 465, 468-69 (7th Cir. 1992); *United States v. Sandoval*, 990 F.2d 481, 485 (9th Cir. 1993).

attempt to find Garcia occurred three years later, after Garcia had established his residence in Chicago. While there was some evidence that officers looked for Garcia at other locations shortly after the shooting, the police officers who testified were unable to provide any details regarding these stops. That the police did not find Garcia at his apartment on the night of the shooting and did not receive any solid leads does not provide a sufficient basis to classify him as a fugitive.

The police did not gather evidence that could support an inference that Garcia fled his home. For example, there was no evidence that Garcia's apartment appeared as if it had been recently vacated or that the police surveilled Garcia's apartment to see if he returned. The police did not attempt to ascertain where Garcia was employed and inquire with his employer as to whether he continued to report to work. After the police left Garcia's apartment on the night of the shooting, there is no indication they ever returned. Further, there is no evidence the state believed Garcia left Missouri or classified him as a fugitive before 2009. Pet. A7 ("Although the police were informed that Garcia might go to California or Illinois, there is no evidence that anyone had actual knowledge that he left the state.").

Even if Garcia fled his home as Missouri contends, this would not have relieved the state of its duty to apprehend him and bring him to trial expeditiously. In *United States v. Blanco*, 861 F.2d 773, 778 (2nd Cir. 1988), the court held that the government had a duty to pursue a defendant who fled to Colombia with reasonable

diligence. Finding the government fulfilled that duty, the court described the government's efforts to apprehend the defendant:

> Before 1984, when Blanco was living in Colombia, the government met its duty of due diligence by having its agent, Charles Cecil, investigate Blanco's whereabouts and attempt to keep track of her through an informant. The government also made considerable efforts from the time a warrant was issued for her arrest in 1974 until the time she was spotted in California in 1984 to detect whether Blanco had entered the United States. The fugitive report on Blanco filed with the National Criminal Information System and the Treasury Enforcement Communications System, the passport and visa "lookouts" filed by the DEA for someone of her name and description, the search for her in Miami hospitals in 1977, and the search for her body in 1980 are all examples of the government having mounted diligent efforts to meet its constitutional responsibility.

Id. See also Rayborn, 858 F.2d at 90 (stating that "whenever an individual has been officially accused of a crime, not only is the government charged with the burden of bringing the accused swiftly to trial, but it is under an obligation to exercise due diligence in attempting to locate and apprehend the accused, even if he is a fugitive who is fleeing prosecution"); *Mitchell*, 957 F.2d at 468-69 (finding that government acted with due diligence and good faith in bringing defendant to trial after he fled to Colombia); *Sandoval*, 990 F.2d at 485 ("Accepting the notion that the government has some obligation . . . to find a fugitive defendant and bring him to trial."). Thus, assuming Garcia was a fugitive, the "reason for the delay" factor still would weigh against the state because the police did not look for Garcia at all for years after he was indicted.

The petitioner asserts that the Missouri Supreme Court imposed a new requirement on the speedy trial analysis when it concluded that a pretrial delay cannot be attributed to a defendant in the absence of evidence that the defendant did something wrong. Pet. 15-16. According to the petitioner, courts have repeatedly held defendants responsible for delays in their capture and prosecution even when the defendants' actions are "completely blameless from a moral standpoint." Pet. 16. The cases upon which the petitioner relies are inapposite because they involved defendants who knew of the charges against them and engaged in litigation strategies that delayed their trials. *See United States v. Loud Hawk*, 474 U.S. 302, 316-17 (1986) (pursuing an interlocutory appeal); *Wells v. Petsock*, 941 F.2d 253, 258 (3rd Cir. 1991) (filing a motion to change venue); *Ringstaff v. Howard*, 885 F.2d 1542, 1543 (11th Cir. 1989) (requesting a mental-health evaluation); *State v. Owsley*, 959 S.W.2d 789, 794 (Mo. 1997) (requesting a mental health evaluation and moving for a change of judge); *State v. Bolin*, 643 S.W.2d 806, 813-14 (Mo. 1983) (moving to quash the indictment).

The Missouri Supreme Court did not alter the speedy trial analysis articulated in *Barker* and *Doggett*. It did not refuse to consider the effect of Garcia's conduct on the delay. Instead, it determined that Garcia's actions did not cause the delay because he was not aware of the charges and the police could have apprehended him when he was indicted if it had acted diligently. This conclusion is consistent with *Doggett* and other cases. *See Doggett*, 505 U.S. at 652-53 (noting

that the authorities could have found Doggett within minutes if it had acted diligently); *Ingram*, 446 F.3d at 1338 (holding that the delay "was caused entirely by the Government" in the absence "of any fault attributable to Ingram"); *United States v. Brown*, 169 F.3d 344, 349 (6th Cir. 1999) (refusing to hold defendant culpable for pretrial delay where the defendant was not aware of the issuance of the indictment and did not intentionally conceal himself from law enforcement agents); *United States v. Mendoza*, 530 F.3d 758, 763 (9th Cir. 2008) (stating that *Doggett* requires the government to make an effort to notify the defendant that he had been indicted, or otherwise continue to actively attempt to apprehend him, or else risk that charges will be dismissed on for a speedy trial violation).

- ***Missouri did not persuasively rebut the presumption of prejudice.***

With respect to the fourth *Barker* factor, the Court recognized that "unreasonable delay between formal accusation and trial" creates "'the possibility that the [accused's] defense will be impaired' by dimming memories and loss of exculpatory evidence." *Doggett*, 505 U.S. at 654 (quoting *Barker*, 407 U.S. at 532) (alteration in original). Prejudice to one's defense "is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony 'can rarely be shown.'" *Id.* at 655 (quoting *Barker*, 407 U.S. at 532). Due to the threat unreasonable delays pose to the fairness of criminal proceedings and the difficulty of definitively establishing prejudice, the Court held that a defendant does not always need to prove actual prejudice to prevail on a speedy trial claim. *Id.*

at 658. Where the government's negligence caused the extraordinary pretrial delay, the defendant is "entitled to relief" unless the defendant acquiesced in the delay or the government persuasively rebuts the presumption of prejudice. *Id.*

The petitioner argues that the Missouri Supreme Court misapplied the fourth *Barker* factor by concluding that the disappearance of four witnesses to the shooting prejudiced Garcia's defense. The Missouri Supreme Court relied on *Barker's* admonition that "[i]f witnesses die or disappear during a delay, the prejudice is obvious." Pet. A8 (quoting *Barker*, 407 U.S. at 532). The petitioner claims that because the missing persons "are witnesses for the state," their absence could only weaken the prosecution's case and, therefore, did not prejudice Garcia. Pet. 18.

Whether the missing witnesses would have testified favorably to the prosecution is unknown. The only indication as to how these witnesses would testify comes from reports prepared by police officers who interviewed the witnesses. Missouri's theory that the testimony of the missing witnesses would aid the prosecution's case necessarily assumes that the police accurately summarized the witnesses' statements and that the witnesses, if they were available, would testify consistently with the summaries. But the witnesses' unavailability makes these assumptions totally unverifiable. Even if the summaries are accurate, the witnesses (all of whom appear to be of Mexican descent) may have been influenced by the police or under duress from outside forces when they gave their statements. The state's negligence in bringing this case to trial in a timely manner deprived

Garcia of the opportunity to interview these witnesses and to determine for himself whether they would have provided evidence beneficial to his defense. Under these circumstances, Missouri should not be permitted to rely on the police summaries as affirmative proof that the delay did not impair Garcia's defense. *Cf. Crisp v. Duckworth*, 743 F.2d 580, 584 (7th Cir. 1984) (stating that defense counsel's review of statements witnesses made to police cannot "generally serve as an adequate substitute for a personal interview").

Missouri complains that Garcia did not "identif[y] a single witness who would have testified on his behalf but is now unavailable, or whose memory has faded." Pet. 19. But requiring Garcia to demonstrate that the missing evidence would aid his defense is contrary to *Doggett*. In cases where an extraordinary pretrial delay is caused by official negligence, the issue is not whether the defendant can specifically prove that the delay impaired his defense but whether the state can rebut the prejudice presumptively arising from the lengthy delay. *Doggett*, 505 U.S. at 657-58.

In *Doggett*, the Court recognized the difficulty in determining which side experiences greater prejudice from an extraordinary pretrial delay. *Doggett*, 505 U.S. at 656. One type of prejudice is the possibility the defense will be impaired by diminishing memories and loss of exculpatory evidence. *Id.* at 654. This is the most serious form of prejudice "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.* (quoting *Barker*, 407 U.S. at 532). Because impairment to the defense is exacerbated by the passage of time, "the

presumption that pretrial delay has prejudiced the accused intensifies over time." *Id.* at 652. Doggett, therefore, was permitted to rely on the presumptive prejudice arising from the eight and one-half year delay between his indictment and arrest where six years of the delay was attributable to official negligence.

The Missouri Supreme Court's conclusion that Garcia did not have to demonstrate actual prejudice and could rely on the presumptive prejudice is in accord with *Doggett*. The pretrial delay attributable to the state's negligence was one year longer than the unjustifiable portion of the delay in *Doggett*. *Doggett*, 505 U.S. at 658. Missouri finds itself in the same position as the government in *Doggett*: it did not affirmatively prove that the missing evidence and faded memories of the remaining witnesses will not impair Garcia's ability to defend himself. *Id.* at 658 n.4 (noting that the government "has not, and probably could not have, affirmatively proved that the delay left [Doggett's] ability to defend himself unimpaired"). Because the state failed to rebut the presumption of prejudice, the Missouri Supreme Court properly held that the prejudice factor weighed in Garcia's favor.

II. The Missouri Supreme Court's decision does not unduly burden law enforcement authorities or reward suspects who become fugitives.

The petitioner maintains that the Missouri Supreme Court's decision will have a detrimental effect on law enforcement because it will force law enforcement agencies to allocate scarce resources to apprehend suspects who flee the jurisdiction

or run the risk that the Sixth Amendment will bar the prosecution of these suspects. Missouri's fears are unwarranted.

The government has a duty under the Sixth Amendment to apprehend criminal suspects and bring them to trial promptly. *Barker*, 407 U.S. at 527 ("A defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process.") (internal footnotes omitted). Justice White observed in *Barker* that "unreasonable delay in run-of-the-mill criminal cases cannot be justified by simply asserting that the public resources provided by the State's criminal-justice system are limited." 407 U.S. at 538 (White, J., concurring). As discussed in the prior section, Missouri's contention that Garcia's relocation to Chicago relieved the state of its obligation to conduct a timely post-indictment search for Garcia is at odds with *Doggett's* reasonable diligence standard. *Id.*

The Missouri Supreme Court's ruling is extremely narrow and will not impose an undue burden on law enforcement authorities. The court held that the second *Barker* factor weighed against the state because there was no evidence the police made any effort to locate Garcia for seven years after his indictment. The court did not suggest that the state had to undertake a manhunt for Garcia or otherwise allocate substantial law enforcement personnel or resources to apprehend Garcia.[8] It reasonably held that the state failed to satisfy its obligation under Sixth

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[8] The state is under no obligation to make futile efforts to locate a suspect. *See Blanco*, 861 F.2d at 778 ("Due diligence does not require the government to pursue goals that are futile."). But this is not

Amendment to provide Garcia with a speedy trial when it failed to pursue him with reasonable diligence.

Blaming Garcia for the delay would improperly reward the state for its incompetence and invite future episodes of negligence. As the Court observed in *Doggett*, "[c]ondoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the state's fault and simply encourage the government to gamble with the interests of criminal suspects assigned a low prosecutorial priority." 505 U.S. at 657. This reasoning is equally applicable to this case. The reason the state failed to apprehend Mr. Garcia for seven years after he was indicted is simple: absolutely no effort was made to find him. The lack of post-indictment efforts to apprehend Mr. Garcia cannot be squared with *Doggett's* reasonable diligence standard.

III. The Missouri Supreme Court's decision is not inconsistent with the federal circuit court cases cited by Missouri.

The cases that the petitioner claims conflict with the Missouri Supreme Court's decision are distinguishable and do not call the state court's reasoning into question.

In *Robinson v. Whitley*, 2 F.3d 562 (5th Cir. 1993), Robinson was arrested in Louisiana on a rape charge. Ten days later, he escaped from police custody and fled

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a case where efforts to find Garcia would have proven futile, as evidence by the finding that the police could have easily found Garcia seven years earlier using the same computerized search it eventually used to locate him. Moreover, the police did not utilize numerous other resources available to Kirkwood officers that likely would have led them to Garcia much earlier than 2009. *See supra* at 5.

to Texas, where he assumed an alias and was arrested after committing several crimes. *Id.* at 565. The court found that Robinson's decision to escape from police custody and adopt an alias caused the pretrial delay. *Robinson* is inapposite because Garcia did not have contact with the police or know of his indictment prior to his arrest and did not assume a false identity.

In each of the other cases cited by the petitioner, the court affirmed the denial of a petition for habeas corpus under the narrow standard of review mandated by the Antiterrorism and Effective Death Penalty Act of 1996. Under that standard, a federal court reviewing a state court's balancing of the *Barker* factors may not grant habeas relief unless "there is no possible balancing of the factors that both supports the [state court's] ultimate decision and is not contrary to clearly established Supreme Court precedent." *Jackson*, 390 at 1266-67. The AEDPA requires federal courts to "presume that a state court's factual findings are correct unless rebutted by clear and convincing evidence." *Id.* at 1262.

In *Wilson v. Mitchell*, 250 F.3d 388, 392 (6th Cir. 2001), Wilson was charged with first-degree murder in 1973. Officers actively pursued him for six years. *Id.* The police also issued a nationwide all-points bulletin for Wilson and contacted his father, mother, and stepmother; his current and former schools; and his current employer. *Id.* After searching unsuccessfully for Wilson for six years, the police made no further attempt to locate him until shortly before he was arrested in 1995. *Id.*

Under the habeas standard, the court concluded it could not fault the government for the delay in apprehending Wilson. Because Wilson offered no evidence challenging the trial court's finding that he actively evaded the police and concealed his whereabouts for the entire twenty-two-year period between his indictment and arrest, the court had to presume the correctness of the state court's finding of active evasion: "None of Wilson's evidence calls into question the trial court's conclusion that Wilson was a fugitive who repeatedly changed his identity, name, physical appearance, and whereabouts to avoid being brought to trial on the charges." *Id.* at 395 (internal quotation omitted). Thus, the court held that "even if the police made mistakes in their search for Wilson, he is not entitled to relief" because "his active evasion 'is more to blame for that delay.'" *Id.* at 396 (quoting *Doggett*, 505 U.S. at 651).

Wilson is clearly distinguishable. After Wilson was indicted, the police pursued him without success for six years. In this case, the police made no effort to locate Garcia for seven years after his indictment. Wilson's active evasion of law enforcement authorities throughout the post-indictment period doomed his speedy trial claim. Garcia lived openly under his own name during the entire post-indictment period. Because Garcia had no knowledge of his indictment when he moved to Chicago and lived openly and notoriously in Chicago, his relocation cannot reasonably be equated with Wilson's twenty-two year campaign to evade the authorities.

In *Rashad v. Walsh*, 300 F.3d 27, 31 (1st Cir. 2002), Rashad knew the police were looking for him in connection with a rape charge. He moved out of his apartment and spent the next twenty-seven months avoiding the authorities. *Id.* When he was arrested on an unrelated charge, Rashad gave an alias and was convicted under that name. *Id.* In 1987, while he was incarcerated in Massachusetts for the unrelated crime, a grand jury indicted him on the rape charge. *Id.* After he completed the sentence for the unrelated crime, Massachusetts authorities extradited him to Texas to face other unrelated charges. *Id.* Massachusetts negligently failed to take steps to regain custody of Rashad, and the Texas prison released Rashad in August 1990. *Id.* While Rashad was incarcerated, he contacted his attorney regarding the status of the Massachusetts case. *Id.* After he was released from prison, Texas authorities informed Rashad of the charges pending against him in Massachusetts when he applied for a driver's license. *Id.*

For fifteen months after his release from the Texas prison, Rashad's whereabouts were unknown. *Id.* at 32. In November 1991, he returned to Boston and lived openly under his own name. *Id.* Although he was stopped on two occasions for traffic violations and posted bail for a friend, the pending rape charge escaped the authorities' attention. *Id.* Four months after returning to Massachusetts, Rashad was arrested. *Id.* When informed of the outstanding warrant, Rashad repeatedly denied any knowledge of the rape charges. *Id.* He later

acknowledged that he denied he was the person named in the warrant and underlying indictment to avoid prosecution. *Id.*

The court of appeals distinguished the case from *Doggett*, noting that Rashad "had been informed there were charges pending against him." *Id.* at 38. Citing the lack of evidence adduced by Rashad, the court declined to overturn the state court's finding that Rashad's evasion caused the fifteen-month delay following his release from the Texas prison:

> In the habeas context, a petitioner who fails to adduce any evidence regarding a segment of pretrial delay cannot rebut the presumption of correctness to which the state court's finding against him is entitled. The petitioner has not satisfied that burden in regard to this fifteen-month traipse. We therefore lack any basis for disturbing the Massachusetts Appeals Court's finding that the petitioner was a fugitive during that period (and, thus, responsible for the attendant delay).

Id. (internal citations omitted).

Missouri maintains the cases are similar because in each case there is a period of time where the defendant's whereabouts is unknown. There was no evidence regarding Rashad's whereabouts for fifteen months after his release from the Texas jail, and no evidence was presented regarding Garcia's whereabouts between April 1998 and September 2000. *Rashad* is distinguishable because the period occurred after Rashad had been indicted. In this case, that period was between 1998 and 2000, which preceded Garcia's indictment by approximately eighteen months. Because the Speedy Trial Clause was not triggered until Garcia

was indicted in 2002, *MacDonald*, 456 U.S. at 6-7, this period is not relevant to the speedy trial analysis.

CONCLUSION

The Missouri Supreme Court's decision is in harmony with the Court's Sixth Amendment jurisprudence. The Missouri Supreme Court found that Garcia had no knowledge of the indictment prior to his arrest, that the police failed to pursue him with reasonable diligence, and that the police could have apprehended Garcia when the grand jury indicted him had they acted diligently. Based on these findings, the Missouri Supreme Court correctly applied *Doggett* in holding that the state was responsible for the delay based on its failure to pursue Garcia for seven years after he was indicted and that Garcia could rely on the presumption of prejudice due to the extraordinary length of the pretrial delay.

For the reasons stated, the respondent respectfully requests that the Court deny the petition for a writ of certiorari.

Respectfully submitted,

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